No. 162

In the Supreme Court of the United States

OCTOBER TERM, 1958

HOWARD C. FORD AND LORRAINE H. FORD, PETITIONERS

v.

UNITED GAS CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Howard C. Ford and Lorraine H. Ford respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 7, 1958.

OPINIONS BELOW

The United States District Court for the Northern District of Mississippi did not write an opinion. Its orders and judgments appear in the record[1] (R. 39, 383, 386). The opinion of the United States Court of Appeals for the Fifth Circuit has not been officially reported.

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[1] A certified copy of the transcript of the record in this case, including the proceedings in the Court of Appeals, and nine additional copies of the record printed for the use of the Court of Appeals have been filed with the Clerk of this Court. References, except when otherwise noted, are to the record which was printed for the use of the Court of Appeals.

It appears in the certified copy of the transcript of record and is set out in the Appendix, *infra* (R. 399, Appendix p. 24).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 7, 1958. A petition for rehearing, seasonably filed, was denied without a written opinion on June 11, 1958. The judgment, petition for rehearing and order of denial appear in the certified copy of the transcript of record and are set out in the Appendix, *infra* (R. 405, 406, 428, Appendix pp. 29, 30; 33). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the actions of the District Court in allowing Respondent's motion requesting an order bringing in others as partie- plaintiffs and in entering an order thereon bringing in and making eight insurance companies named therein additional parties plaintiffs without any evidence to support the allegations of said motion or the essential findings necessary for the entrance of such an order are arbitrary and void and result in the taking of petitioners' property without procedural due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

2. Whether the District Court deprived itself of jurisdiction and of authority to proceed further with this action after allowing respondent's said motion and entering said order where (1) there was no allegation in said motion and no evidence submitted to said Court showing that all of said named insurance companies thus brought in and made additional parties plaintiffs were citizens of a different state from that of respondent and (2) said motion alleged that four of the named insurance com-

panies had separate claims against respondent amounting to less than $3,000.

3. Whether a federal court sitting in the state of Mississippi, having jurisdiction of a tort action only because of the diversity of citizenship of the parties and the amount in controversy, must apply (1) a statute of the forum state empowering assignors of a chose in action to bring and continue a suit thereon in their name and (2) the common law of said state as declared by the decisions of its highest court to the effect that where a debt has not been paid in full partial subrogation will not be allowed.

4. Whether the Court of Appeals in the instant case has decided an important state question in a way in conflict with applicable state law.

5. Whether the Court of Appeals in the instant case has decided a federal question in a way in conflict with applicable decisions of this Court.

6. Whether the Court of Appeals in the instant case has so far sanctioned a departure of the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISION, STATUTES AND RULES OF PROCEDURE INVOLVED

The pertinent part of the Fifth Amendment to the Constitution of the United States; The pertinent parts of Sections 1332 and 1652, Title 28, United States Code; Section 1448 of the Mississippi Code of 1942 and the pertinent parts of Rules 7, 17, 46, and 51, Rules of Civil Procedure for the United States District Courts, Title 28, United States Code, are set forth in the Appendix, *infra*, pp. 34-36.

STATEMENT

Asserting diversity jurisdiction and alleging that a fire had occurred in their store building, in Sardis, Mississippi, on January 10, 1956, as a result of respondent's negligent installation therein of a gas burning appliance; that because of said fire said building and the air conditioning machinery attached thereto were damaged in the amount of $11,638.22; that their store building fixtures were damaged to the extent of $1,265.00 and that the damage to their stock of merchandise situated in said building at the time of said fire amounted to $46,177.60, petitioners filed this action against respondent in the United States District Court for the Northern District of Mississippi, on August 14, 1956, to recover damages in the amount of $59,080.82 and interest thereon from the date of the fire (R. 2-22, 38).

Respondent filed its answer on December 17, 1956, admitting diversity jurisdiction and that it made the contract for installation attached to the complaint but denied that it was negligent or in any way liable for the fire or the damages caused thereby (R. 23-27, 28-33).

The case was set for trial in the District Court on May 8, 1957, a day of the regular May term. On May 6, 1957, respondent filed an unverified motion alleging that eight named insurance companies had paid petitioners $30,000, the full amount of insurance carried on their stock of merchandise under contracts subrogating them to petitioners' claim for damages, that they were real parties in interest and should be joined as parties plaintiff in this action. Respondent did not exhibit any of the alleged insurance contracts with or otherwise make them a part of its motion (R. 34-37). On May 8, 1957, the District Judge entered an order making the eight

named insurance companies additional parties plaintiffs in this action (R. 39-40). Respondent did not introduce in evidence any of the alleged insurance contracts. All of the evidence offered and admitted in the District Court is a part of the record before this Court (R. 392, 397). The record does not contain one word of evidence which supports any of the allegations of respondent's said motion or any of the necessary findings for the entry of said order and there is no evidence whatever in the record that shows or even tends to show that any of the eight named insurance companies who were brought into this case at the instance and request of respondent and who were made additional parties plaintiffs by said order had insurance contracts with petitioners subrogating them pro tanto to petitioners' claim for damages. None of the insurance companies filed pleadings. Respondent did not allege or offer any proof to show the citizenship of any of the named insurance companies but did allege in its said motion that petitioners were seeking by this action to recover from respondents the sum of $46,177.60 as damages to their stock of merchandise occasioned by the fire on January 10, 1956, and that four of said named insurance companies were subrogees of a part of petitioners' claim against respondent amounting to less than $3,000 (R. 34-35).

Without some explanation, the first paragraph of the order which the District Court entered on May 8, 1957, might possibly give rise to the implication that the eight insurance companies named therein came into this case voluntarily. However, the record discloses that the District Judge clearly put at rest any such implication while hearing the motion of petitioners for a new trial, on May 14, 1957, on which date the following colloquy occured:

"MR. BREWER:

Well, I think one thing should be corrected. Billy wrote in that motion that we consented to come in.

"THE COURT:

You were brought in. You didn't come in voluntarily. You had consented that the matter might go ahead and be tried without any service. You came in without service.

"MR. McCLURE:

I would like to dictate that statement in the record that Mr. Brewer represented the nine insurance companies, and that he appeared at the trial and consented for the cases to be consolidated and go to trial, insofar as the insurance companies were concerned.

"THE COURT:

Take this, Mr. Reporter.

A motion was made before the Court, bringing these parties in, and the Court orally sustained the motion. I think that is probably as far as it went. Mr. Brewer was the representative of the insurance companies.

Mr. Brewer consented to come in, but it was as to the time involved. He stated he would not insist on any delay, that we might go ahead with the lawsuit, and his companies would waive service. Now that is absolutely what happened. His companies have come in, and he sat there and represented them" (R. 381-382).

Thereafter, the Jury heard the evidence of petitioners and respondent, received the Court's charge and on May 10, 1957, returned a verdict in favor of respondent (R. 379). On the same day the District Court entered its judgment providing that petitioners have and recover

naught from the respondent (R. 383-384). On May 14, 1957, petitioners moved the District Court to set aside and vacate the jury verdict and judgment entered thereon and to grant them a new trial (R. 385). The District Court entered an order on the same day overruling said motion (R. 386).

In considering petitioners motion for a new trial the District Judge stated that he did not think the jury was influenced by the presence of the insurance companies in the suit and that he thought the record would bear him out "* * ** that the Court made a statement to the jury that these people were in here more or less on a nominal basis, as to what their rights would be if the jury should find a verdict for the Plaintiff, but they had nothing in the world to do with the merits of the lawsuit, * * *" (R. 382). The record does not contain any statement of the Court to the jury relating to that phase of the matter.

During the course of the trial respondent introduced as a witness Mrs. Juliet Andrews, who was permitted by the Court, over the objection of petitioners, to give testimony relating to fire insurance coverage by petitioners as follows:

"BY MR. McCLURE:

Q. You are Mrs. Juliet Andrews?

A. Yes, Sir.

Q. Where do you live, Mrs. Andrews?

A. Sardis, Mississippi.

Q. Are you married?

A. I am a widow.

Q. What business are you engaged in?

A. The insurance business.

Q. What type of business do you operate in Sardis, what kind of insurance?

A. General insurance agency, fire, hospital, health, accident, all kinds.

Q. Do you recall an instance when the Ford Department Store at Sardis caught on fire and was partially damaged or burned?

A. Yes, I do.

Q. Had you in your business, issued any fire insurance policy in favor of Mr. Ford?

"MR. FORD:

We object, Your Honor. I don't see that this is competent at all.

"THE COURT:

What is the purpose of this examination?

"MR. McCLURE:

If Your Honor please, it is to show that she went down and why she went down to the store.

"MR. FORD:

Well, he can show what she did, but he certainly doesn't have to go into all this business of writing insurance.

"THE COURT:

Well, go ahead. You've got her down there now.

Q. (By Mr. McClure) What was the occasion of your going down to the Ford Department Store after the fire, if you did go?

A. I didn't hear the fire whistle.

Q. Well, what occasion was that?

A. Mr. Ford called me the next morning and said that he had had a fire, and I told him I was sorry, and I would be down to see about it, because he did have some insurance with me.

"THE COURT:

I don't think that is objectionable, gentlemen, to tell why, but that part has gone in. Now let's see what Mr. Ford said or what she knows" (R. 349-350).

Both sides having rested and respondent's motion for a directed verdict, on the ground that the evidence was insufficient to take the case to the jury, denied, the cause was submitted to the jury on a general charge. During the first part of the Court's charge the jurors were told that the burden of proof of the claim of negligence was upon the plaintiffs and that their claim of negligence should be established by a preponderance or greater weight of evidence, not as in a criminal case beyond all reasonable doubt and to a moral certainty, but by a preponderance or greater weight of the evidence (R. 369, 370). Later on the Court charged the jury, among other things, as follows:

"* * * This contract which the Plaintiff accepted, did not provide that the Plaintiff would pay for the best job and the best material money could buy, but it did contract, that is, from the testimony as I gather it, that the Defendants would give him a safe job" (R. 373).

The contract which petitioners accepted is a part of the record (R. 10-18, 23-24, 29, 44-47). There is nothing

in the contract providing and there was no evidence before the District Court which showed or even indicated that petitioners agreed to accept or pay for less than the best job and best material money could buy. In fact, the testimony of respondent's expert witness, W. C. Shultz, is to the contrary trend in respect to the boiler (R. 330, 332).

In the presence of the jury and at the conclusion of the general charge which the Court gave the jury, in response to the inquiry of the court as to whether there were any objections, exceptions or requests, petitioners counsel stated, "There are no requests for additional charge, if the Court please, but we have an exception to that part dealing with interest. We would like to except to that part of the charge, if the Court please" (R. 369, 378). The requested exception related to the ruling of the Court in chambers limiting a possible recovery of interest (R. 368-369) and to the part of the Court's charge connected with that aspect of the case (R. 377).

Immediately thereafter, the Court charged the jury as follows:

> "Now Gentlemen, there would be only two proper forms of the verdict. If you think the Plaintiff has made out a case so that you can honestly say that from the evidence you are positive how the fire started, where it started, and was the result of the negligence of the Defendant in the case, then your verdict would be, 'We, the Jury, find for the Plaintiff, and assess their damages blank dollars.'
>
> "On the other hand, if you think they have failed to meet the burden as the Court heretofore outlined, then your verdict would be, 'We, the Jury, find for the Defendant'.

"Now some of you gentlemen may have served as jurors in the State Court where nine juror verdict prevails. That does not prevail in this Court. The verdict of the jury must be the verdict of all twelve.

"Take these two forms of verdict, retire to your room, and bring in that one which satisfies your conscience as to the rights of this lawsuit" (R. 378-379).

The Court did not give petitioners an opportunity to object to this part of its charge out of the hearing or in the presence of the Jury (R. 378-379).

The United States Court of Appeals for the Fifth Circuit affirmed the actions, orders and judgments of the District Court, holding, in an opinion by Hutcheson, Chief Judge, that the record failed to show timely objection or exception of petitioners, stating their grounds therefor, to the orders or actions of the District Court in respect of the insurance companies and, in addition, that none of the matters of which petitioners attempt to complain of constitute reversible error.

The Court also held that petitioners' right under Section 1448, Mississippi Code of 1942, was not in any way interfered with and that since the insurance companies were not indispensable parties, nothing which respondent, the insurance companies as intervenors, or the court, did or could do, could or did divest the District Court of jurisdiction to try petitioners' suit.

The Court further held that it was quite clear that the introduction of Mrs. Andrews testimony was not reversible error because no reason or ground was stated in support of the objection and also because no possible basis for a claim of prejudice could exist since the bare fact testified to by her, that petitioners had insurance, was already established by the action of the District

Court making the insurance companies parties and the act of the companies in assisting petitioners to recover in the suit.

As to the errors in the District Court's charge to the Jury, the Court merely stated that petitioners are, because of their failure to object at the time opportunity was offered therefor, now foreclosed from asserting them.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the order of the District Court entered on May 8, 1957, is valid.

2. In holding that any of the eight insurance companies named therein owned portions of the substantive right against the tortfeasor or that any of said insurance companies were real parties in interest.

3. In holding that the District Court had jurisdiction to try this action after entering its order of May 8, 1957.

4. In failing to apply the provisions of a statute of the State of Mississippi and the public policy of said state as set out therein.

5. In failing to apply the common law and public policy of the State of Mississippi as declared by the decisions of the highest court of said state.

6. In holding that petitioners' sole right to prosecute the suit was not in any way interfered with.

7. In holding that the insurance companies made parties plaintiffs by said order are intervenors.

8. In holding that no prejudicial or reversible error had been assigned or shown.

9. In holding that petitioners had been afforded an opportunity to object in the District Court to all of the errors complained of and that because of their failure to

make timely objections there they are now foreclosed from asserting them.

10. In sanctioning a departure of the District Court from the accepted and usual course of judicial proceedings.

11. In affirming the rulings, orders and judgments of the District Court.

12. In denying the petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. Before the District Court could validly or constitutionally enter an order bringing in additional parties plaintiffs in this action it was required to find from the evidence presented to it that all of the parties thus brought in owned some substantial right against the respondent and that they were, therefore, real parties in interest. The making of an essential finding without supporting evidence is arbitrary and void. *Baltimore & O. R. Co. v. United States* 264 U. S. 258, 265, 68 L. Ed. 667, 674. It is generally recognized that the legal import of the phrase "due process of law" is the same in both the Fifth and Fourteenth Amendments. The Federal guaranty of due process extends to judicial as well as legislative action. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* 281 U. S. 673, 680, 74 L. Ed. 1107, 1113. The fundamentals of a trial were denied to petitioners when the District Judge sustained respondent's motion and entered an order bringing in the eight insurance companies named therein as additional parties plaintiffs upon the strength of evidential facts not introduced in evidence. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known. *Ohio Bell Teleph. Co. v. Public Utilities Com.* 301 U. S. 292, 304, 81 L. Ed. 1093, 1101. The Court of Appeals evidently took the view in considering the appeal and the petition for rehearing that because the

record failed to show an objection or exception to the actions of the District Judge in allowing respondent's said motion and in entering said order petitioners are now foreclosed from asserting the important constitutional question of the lack of procedural due process of law in the trial court. Obviously, the Court must have been aware of the fact that there was no evidence in the record supporting the allegations of respondent's said motion or the essential findings necessary to support said order since it made express reference in the third paragraph of its opinion to some of the allegations of said motion instead of to some record proof supporting said allegations. The right of petitioners to insist that the lack of any evidence whatever to support the essential findings invalidates the order of the District Court entered on May 8, 1957, was not lost by the failure of the record to show an objection or exception and petitioners did not waive their legal rights because the record may show that the only action which the insurance companies' counsel took was taken on the side of, and in aid of petitioners' cause and with petitioners' full consent and approval. Cf. *United States v. Abilene & S. R. Co.* 265 U. S. 274, 289-290, 68 L. Ed. 1016, 1023. Moreover, since the allegations in respondent's said motion to the effect that said insurance companies had insurance contracts with petitioners subrogating them to petitioners' claim for damages are conclusions of the pleader and since respondent offered no evidence to support said allegations petitioners had no opportunity to make and record an objection or exception to the rulings and actions of the District Judge in allowing said motion and in entering said order at the time they were made and entered. Rule 7 (a) of the Rules of Civil Procedure for the United States District Courts prohibited petitioners from filing any responsive pleadings denying the alle-

gations of respondent's said motion. Petitioners could not bring up the question of the insufficiency of the allegations of said motion by a demurrer, plea or an exception under the provisions of Rule 7 (c). It is expressly provided in Rule 46 that if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. Acquiesence in the loss of fundamental rights will not be presumed by this Court. *Ohio Bell Teleph. Co. v. Public Utilities Com.*, supra. Furthermore, if it can be said from the facts appearing of record in this case that petitioners were afforded an opportunity to make and record an objection to the actions of the District Judge in allowing respondent's said motion and in entering said order, this Court may and often has, in the exercise of discretion, considered plain errors not raised or assigned in the lower courts which find expression and sanction in the Federal Constitution. *Mahler v. Eby* 264 U. S. 32, 45, 68 L. Ed. 549, 557. We submit that the gravity and seriousness of this and other plain errors appearing in the record and the importance of this and other raised questions presents a case where this Court, in the exercise of its discretion, should consider them notwithstanding the lack of any objections, exceptions, specifications or assignments of error in the lower Courts.[2]

Thus, the question for decision is, whether the actions of the District Court in allowing Respondent's motion requesting an order bringing in others as parties plaintiffs and in entering an order thereon bringing in and making eight insurance companies named therein additional parties plaintiffs without any evidence to support

[2] The Constitutional question of the lack of due process of law was squarely presented to the Court of Appeals in the petition for rehearing.

the allegations of said motion or the essential findings necessary for the entrance of such an order are arbitrary and void and result in the taking of petitioners' property without procedural due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

2. Petitioners invoked the jurisdiction of the District Court in this action solely because of diversity of citizenship of the parties and the presence of the necessary jurisdictional amount as provided by Section 1332, Title 28, United States Code. No federal question was involved.

The record shows nothing as to the citizenship of the eight insurance companies named in the order which the District Court entered on May 8, 1957. Respondent alleged in the motion requesting the Court to enter that order that four of the named insurance companies were subrogees to a part of petitioners' claim against respondent amounting to less than $3,000. We submit that when the eight named insurance companies were brought in and were made additional parties plaintiffs by said order it became necessary under the provisions of 28 U.S.C. 1332, for the record to affirmatively show by allegation or proof that all of said insurance companies were citizens of a state other than the State of Delaware where respondent had its citizenship and that each named company had a claim against respondent exceeding the sum or value of $3,000 exclusive of interest and cost in order for the District Court to continue to have jurisdiction and authority to try the suit. Actually, respondent's allegations show that only three out of the eight named insurance companies had claims against respondent exceeding the sum or value of $3,000 exclusive of interest and cost. Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be

sued, in the District Court. *Strawbridge et al. v. Curtiss et al.* 3 Cranch (US) 267, 2 L. Ed. 435; *New Orleans v. Winter et al.* 1 Wheat (US) 91, 4 L. Ed. 44. The facts on which the jurisdiction of the District Court rests must, in some form, appear positively on the face of the record. *Continental Ins. Co. v. Rhodes* 119 U. S. 237, 30 L. Ed. 380. An appellate court, in the exercise of its power, on its own motion, must deny the jurisdiction of the District Courts, in all cases coming before it on appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act. *Parker v. Ormsby* 141 U. S. 81, 35 L. Ed. 654. Where the record shows nothing as to the citizenship of the parties, the case must be reversed for want of jurisdiction in the District Court. *Roberts v. Lewis* 144 U. S. 653, 658, 36 L. Ed. 579, 582. The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether the statutory conditions have been met. They are conditions which must be met by the party who seeks exercise of jurisdiction in his favor. *McNutt v. General* Motors Accept. Corp. 298 U. S. 178, 189, 80 L. Ed. 1135, 1141.*

The question thus presented for decision is, whether the District Court in the instant case deprived itself of

* The reliance which the Court of Appeals put on the decisions in Wichita v. Pub. Utilities Com. 260 U. S. 48; Salem Trust Co. v. Mfg. Finance Co. 264 U. S. 182 at 189 and U. S. v. Aetna Cas. & Sur. Co. 338 U. S. 366 is clearly misplaced. In the first cited case the district court had original jurisdiction on the ground of diverse citizenship and also on the ground that the order in question violated the contract clause and the 14th Amendment of the Federal Constitution. This Court held that the intervention of the Kansas Company, a citizen of the same state as the Wichita company, its opponent, did not deprive the district court of jurisdiction. In the second cited case this Court held that a mere custodian of a fund claimed by different persons is not an indispensable party to a suit between them to settle the claim, so that joining him as a party to the suit will defeat the jurisdiction of a district court which would otherwise exist on the ground of diverse citizenship. The last cited case involved an action against the United States under the Federal Tort Claims Act and is not in point.

jurisdiction and of authority to proceed further with the action after allowing respondent's said motion and entering said order where (1) there was no allegation in said motion and no evidence submitted to said Court showing that all of said named insurance companies thus brought in and made additional parties plaintiffs were citizens of a different state from that of respondent and (2) said motion alleged that four of the named insurance companies had separate claims against respondent amounting to less than $3,000.

3. Respondent's said motion could not have been sustained under the provisions of Section 1448 of the Mississippi Code of 1942 if this suit had been pending in a law court of the State of Mississippi. *Solomon v. Continental Baking Company* 174 Miss. 900, 166 So. 376.*

* In this case, Appellant brought a suit in tort against appellee for damages to her automobile occasioned by a collision between it and a truck owned by appellee. Prior to the bringing of the suit, the right of action had been transferred to the General Exchange Insurance Company, whose attorneys brought the suit in the name of the original claimant. Appellee pleaded the general issue and also alleged that appellant's claim had been assigned to the General Exchange Insurance Company; that it was a necessary party to the litigation and prayed that appellant be required to amend the declaration to show that fact or that the suit be dismissed. In the absence of the jury appellant stated to the trial court that the cause of action had been assigned to the General Exchange Insurance Company prior to the bringing of the suit, but that under Section 505, Code of 1930 (now Section 1448, Code of 1942) appellant had the right to have the suit brought in her name and the court had no right to require her to make an amended declaration. The trial judge sustained the motion of appellee to require appellant to bring in as a party to the litigation the General Exchange Insurance Company. Appellant declined to make the amendment which the trial court directed her to make and said court thereupon dismissed her suit. The Supreme Court of Mississippi, after quoting Section 505, Code of 1930, that Section being identical with Section 1448, Code of 1942, said: "We are of the opinion that the court below was in error in making an order requiring an amendment and dismissing the suit for failure to comply with such order. It will be seen from the above code section that a suit may be brought or continued in the name of the original party, and that the court will allow the person to whom the transfer has been made, on his application, to be substituted as a party plaintiff in said action. This statute enlarges the rights conferred upon the assignee by the common law and has been applied in a number of suits. * * * The judgment of the court below will therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion."

Moreover, respondent's said motion showed on its face that petitioners' debt growing out of the fire loss to their stock of merchandise had not been paid in full. The Supreme Court of Mississippi in a long line of unbroken decisions has repeatedly held that the subrogee is not entitled to subrogation where the debt has not been paid in full. *Magee et al. v. Leggett* 48 Miss. 139, 146; *Fidelity & Deposit Co. of Maryland v. Wilkinson County* 109 Miss. 879, 69 So. 865, 870; U. S. F. & G. Co. v. Sunflower County 194 Miss. 680, 12 So. 2d 142, 144. The Court of Appeals followed this general rule in *State of Mississippi v. First National Bank*, 5 Cir., 66 F. 2d 9, 13. The provisions of 1652, 28 U.S.C., required the District Court and the Court of Appeals, in the instant case, to apply the provisions of the applicable state statute. In addition, this same federal statute required the District Court and the Court of Appeals to follow the rules of common law in Mississippi, as declared by the decisions of the highest court of said state, when applicable. For purposes of diversity jurisdiction a federal court is in effect only another court of the state. *Guaranty Trust Company v. York* 326 U. S. 99, 108, 89 L. Ed. 2079, 2086; *Angel v. Bullington* 330 U. S. 183, 187, 91 L. Ed. 832, 835; *Woods v. Interstate Realty Company* 337 U. S. 535, 538, 93 L. Ed. 1524, 1526-1527. Whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. *Erie Railroad Company v. Tompkins* 304 U. S. 64, 82 L. Ed. 1188, 114 A.L.R. 1487. When a cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. Where local law qualifies or abridges it, the federal court must follow suit. *Ragan v. Merchants Transfer & Warehouse Co.* 337 U. S. 530, 93 L. Ed. 1520. The pro-

visions of Rule 17 (a) and (b) when read together give effect to the state statute applicable to the present case. The holding of this Court in *United States v. Aetna Casualty & Surety Co.* 338 U. S. 366, 94 L. Ed. 171, 12 A. L. R. 2d 444 involved federal rights under the Federal Tort Claims Act and is not in point.

We submit therefore, that both the District Court and the Court of Appeals were required to follow the provisions of 1652, 28 U.S.C. and were thus bound to apply the applicable state statute and common law rule and that the Court of Appeals in the instant case has (1) decided an important state question in conflict with applicable state law and (2) decided a federal question in conflict with applicable decisions of this Court.

4. Evidence relating to petitioners' fire insurance coverage was clearly inadmissible and highly prejudicial. In an action founded in tort the wrongdoer cannot show that the injured person carried insurance. *Coker v. Five-Two Taxi Service* 211 Miss. 820, 52 So. 2d 356, suggestion of error overruled 52 So. 2d 835; *Ward v. Michell* 216 Miss. 379, 62 So. 2d 388. We believe that an examination of the record (R. 349-350) will convince this Court that when petitioner's counsel objected to Mrs. Andrews' testimony enough was said to apprise the trial court of the reason or ground. It is true that the bare fact testified to by her, that petitioners had insurance, was already established by the action of the Court making the insurance companies parties and their presence in the case, nevertheless, her testimony emphasized this fact near the close of the trial and we think it is reasonable to assume that it did have substantial effect on the minds of the jurors. In admitting her testimony the errors of the Court increased in number and the existing prejudice became stronger. That part of the Court's general charge to

the jury which told them. "This contract which the Plaintiff accepted, did not provide that the Plaintiff would pay for the best job and the best material money could buy, but it did contract, that is, from the testimony as I gather it, that the Defendants would give him a safe job" was also erroneous and prejudicial. An instruction not based on the evidence is erroneous in that it introduces before the jury facts not presented, and is well calculated to induce them to suppose that such state of facts, in the opinion of the court, is possible under the evidence and may be considered by them. *Gulf, Mobile & Ohio R. Co. v. Smith* 210 Miss. 768, 775-776, 50 So. 2d 898, 901. Petitioners were afforded an opportunity to object to that part of the Court's charge in the presence of the jury but no objections were made. The District Court also committed highly prejudicial error when it further charged the jury in the following manner: "Now gentlemen, there would be only two proper forms of the verdict. If you think the Plaintiff has made out a case so that you can honestly say that from the evidence you are positive how the fire started, where it started, and was the result of the negligence of the Defendant in the case, then your verdict would be, We, the jury, find for the Plaintiff, and assess their damages blank dollars. On the other hand, if you think they have failed to meet the burden as the Court heretofore outlined, then your verdict would be, We, the jury, find for the Defendant." Petitioners were not afforded an opportunity to object to this part of the Court's charge out of or in the presence of the jury and consequently made no objection thereto. There is no doctrine of the law settled more firmly than the rule which authorizes issues of fact in ordinary civil actions to be determined in accordance with the preponderance or greater weight of the evidence, and neither positive proof, proof beyond doubt nor convincing proof is re-

quired. 20 Am. Jur., pp. 1099-1100, Evidence, Section 1248; 53 Am. Jur., pp. 553-558, Trial, Sections 742-746; 32 C.J.S., pp. 1047-1050, Evidence, Section 1020. Cf. *Molyneux v. Twin* Falls Canal Co. 54 Idaho 619, 631-633, 35 P. 2d 651, 655-656. In the instant case the District Judge improperly, erroneously and effectively told the jury a moment before they retired to consider, weigh and pass upon the issues of fact submitted to them for decision that they must "honestly and positively" say from the evidence how the fire started, where it started and that it was the result of the negligence of respondent before they could return a verdict for the petitioners. Under the common law of Mississippi proof of the fact of negligence as well as proximate cause may rest entirely in circumstances. *Southern Pine Electric Power Ass'n. v. Denson* 214 Miss. 397, 57 So. 2d 859. We confidently assert that this part of the Court's charge was clearly improper and erroneous, highly prejudicial and that it had the effect of peremptorily directing the jury to return a verdict for the respondent. We submit that petitioners should not be prejudiced for their failure to object in this instance since they were not afforded the opportunity contemplated by the provisions of Rule 51. Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. *Hormel v. Helvering* 312 U. S. 552, 557, 85 L. Ed. 1037, 1041.

Wherefore, we submit with confidence that the record in this case clearly shows that the Court of Appeals has sanctioned a departure of the District Court from the accepted and usual course of judicial proceedings in ways and extent as to call for an exercise of this Court's power of supervision. No decision of this Court has ever countenanced such a departure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

AARON L. FORD,
Counsel for Petitioners.

APPENDIX

OPINION

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16877

HOWARD C. FORD AND LORRAINE H. FORD,
Appellants,

v.

UNITED GAS CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(May 7, 1958.)

Before HUTCHESON, Chief Judge and TUTTLE and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: Asserting diversity jurisdiction and alleging that a fire had occurred in their store building as a result of defendant's negligent installation therein of a gas burning appliance, plaintiffs brought this suit to recover as damages, $59,808.32 and interest thereon.

The defendant, admitting diversity jurisdiction and that it made the contract for installation attached to the complaint, denied that it was negligent or in any way liable for the fire or the damages caused thereby.

The cause was set for trial on May 8, 1957, a day of the regular May term, and on May 6, alleging that named insurance companies had paid plaintiffs $30,000, the full amount of insurance carried on their stock of merchandise under contracts subrogating them pro tanto to plaintiffs' claim for damages and that they were real parties at interest, defendant moved to make them parties. On May 8, the district judge, of the opinion that the motion should be allowed, entered an order that the named companies be made parties, and the cause proceeded to trial as scheduled on the pleadings of, and the issues joined between, plaintiffs and defendant.

The evidence all in and defendant's motion for a directed verdict, on the ground that the evidence was sufficient to take the case to the jury, denied, the cause was submitted to the jury on a general charge. At its conclusion, in response to the inquiry of the court whether plaintiffs had any objections, exceptions, or requests, their counsel stated, "We have no request for additional charges and no exception except to the part of the charges dealing with the recovery of interest".

Here upon a record devoid of timely objection or exception, except in the single instance of Mrs. Andrews' testimony, where the matter objected to could not possibly have resulted in prejudice, plaintiffs, under eight numbered specifications, present four grounds for reversal. One of these is the entry of the order making the insurance companies plaintiffs. A second is receiving Mrs. Andrews' testimony that she had issued a fire insurance policy in favor of plaintiffs. A third and fourth are that the charge of the judge was erroneous.

We think it quite clear that no reversible error is assigned or shown. A litigant may not, speculating on a

verdict without making objection, keep silent while matters are transpiring in the trial court and then put the trial judge in error by assigning error in the appellate court in respect of them, except, of course, in a case, which this is not, of plainly prejudicial error. In *Maryland Casualty Co. v. Reid*, 76 F(2) 30, this court thus stated the principles controlling here:

> "This court, as to law cases, is a court of error. We do not retry the case. We review the record made in it for reversible error, error by the judge, in conducting or failing to conduct the trial, which has, by permitting the case to get out of bounds, prejudiced the just result. * * * It is the duty of counsel by objection to call such threatened or actual departure to the judge's attention, and invoke his corrective action, and, if overruled, to make it appear that prejudice has resulted.
>
> "Ordinarily, if his counsel fails to adequately object, or fails to except to adverse action on his objection, a litigant may not complain of what occurred as error, for he will be treated as having assented to it. * * * Ordinarily, too, even this will not suffice where nothing appears except the mere notation and recording of objection and exception, no motion for a mistrial made, no further effort to secure a more binding instruction. * * *"[1]

The record will be searched in vain for any objection or exception of plaintiffs, stating their grounds there-

[1] Other cases stating and applying these principles are: Anderson v. Fed. Cartridge Corp., 156 F(2) 681; Ft. Worth and Denver R.R. v. Harris, 230 F(2) 680; Sinclair Refining Co. v. Howell, 222 F(2) 637; Ft. Worth & Denver R.R. v. Janski, 223 F(2) 704; Am. Fid. & Cas. Co. v. Drexler, 220 F(2) 930; Mills v. Tex. Comp. Ins. Co., 220 F(2) 942; Capella v. Zurich Gen. Acc. Lia. Co., 194 F(2) 558; Western Fire Ins. Co. v. Ward, 131 F(2) 541; N. Y. Life Ins. Co. v. Schlatter, 203 F(2) 184; Ditter v. Yellow Cab Co., 221 F(2) 894.

for, to the orders or actions of the court in respect of the insurance companies. In addition, none of the matters of which appellants attempt to complain here constituted reversible error.

It will be noted that the specifications pertaining to the first ground of error, the order of the court bringing the insurance companies in as parties, complain of it (1) as depriving the court of jurisdiction and of authority to proceed further with the action, and (2) because appellants, under Sec. 1448 Miss. Code for 1942, possessed the sole right to prosecute the action.

Of the first of these complaints, it is sufficient to say that the insurance companies were not indispensable parties and that whatever might have been the result on the jurisdiction if plaintiffs had colluded with defendants to bring them in, they did not do so. This being so, nothing which the defendants, the insurance companies as intervenors, or the court, did or could do, could or did divest the court of jurisdiction to try the plaintiffs' suit, firmly based as it was on the requisite diversity and amount.[2]

As to the second of them, that plaintiffs had the sole right to prosecute the suit, the record affirmatively shows that this right was not in any way interfered with. None of the insurance companies filed pleadings attacking plaintiffs' right and no one filed pleadings as to or for them. The record shows, too, that the only action which the insurance companies' counsel took was taken on the side of, and in aid of plaintiffs' cause and with

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[2] Wichita v. Pub. Utilities Com., 260 U.S. 48; Salem Trust Co. v. Mfg. Finance Co., 264 U.S. 182 at 189; Virginia Elec. & Power Co. v. Carolina Peanut Co., 186 F(2) 816; N.E. Clackamas County Coop. v. Continental Cas. Co., 221 F(2) 321; Williams v. Keyes, 125 F(2) 208; Moore's Fed. Practice, 2 Ed. Vol. 4, p. 138; U.S. v. Aetna Cas. & Sur. Co., 338 U.S. 366.

plaintiffs' full consent and approval, and that the cause was submitted to the jury in the same way.

On the second ground of error, which complains of Mrs. Andrews' testimony, it is quite clear that the introduction of her testimony was not reversible error. This is so both because no reason or ground was stated in support of the objection and because no possible basis for a claim of prejudicial error could exist. The bare fact testified to by her, that plaintiffs had insurance, was already established by the action of the court making the insurance companies parties and the act of the companies in assisting plaintiffs to recover in the suit.

As to the third and fourth grounds of error, the claimed errors in the charge, plaintiffs are, because of their failure to object at the time opportunity was offered therefor, now foreclosed from asserting them.

The judgment is AFFIRMED.

A true copy

(Seal) TEST:

EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit New Orleans, Louisiana

JUDGMENT

Extract from the Minutes of May 7, 1958.

HOWARD C. FORD AND LORRAINE H. FORD,

No. 16877. v.

UNITED GAS CORPORATION.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Howard C. Ford and Lorraine H. Ford, and the surety on the appeal bond herein, Fireman's Fund Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPELLANTS' PETITION FOR REHEARING AND REQUEST FOR STAY OF MANDATE FILED:-

May 26, 1958

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16877

HOWARD C. FORD AND LORRAINE H. FORD, APPELLANTS,

v.

UNITED GAS CORPORATION, APPELLEE.

APPELLANTS PETITION FOR REHEARING

The judgment in the instant case and the opinion by Chief Judge Hutcheson was entered on May 7, 1958.

SUMMARY STATEMENT OF GROUNDS IN SUPPORT OF PETITION FOR REHEARING

The grounds upon which respondent relies in this petition for rehearing are, briefly summarized, as follows:

1. The Court erred in holding that under the facts disclosed in the record and the applicable Rules of Civil Procedure for the United States District Courts appellants were required to make record objections or exceptions to the actions of the District Judge in allowing appellee's motion and in entering the order of May 8, 1957, wherein eight named insurance companies were made additional parties plaintiffs and that none of the matters complained of by appellants constituted reversible error.

2. The actions of the District Judge in allowing appellee's motion and in entering the order of May 8, 1957, bringing in eight named insurance companies as additional parties plaintiffs and the judgment of this Court entered on May 7, 1958, sustaining, approving and affirming said actions without any evidence whatever showing that said companies were entitled to pro tanto subrogation to appellants' claim for damages, under the alleged contracts, deprives, and unless corrected by this Court, will deprive appellants of their property without procedural due process of law in contravention of the provision of the Fifth Amendment to the Constitution of the United States.

3. Assuming arguendo that the eight named insurance companies were entitled to pro tanto subrogation as alleged in appellee's motion, nevertheless, the actions of the District Court in allowing said motion and in entering the order of May 8, 1957, bringing in said insurance companies as additional parties plaintiffs and the judgment of this Court sustaining, approving and affirming said actions are all contrary to the provisions of Section 1652, Title 28 U.S.C.A., in that said actions contravene the statute and public policy of the State of Mississippi and could not be sustained in the courts of said state.

4. Because of the gravity of the errors of the District Judge in allowing appellee's motion and in entering the order of May 8, 1957, bringing in the eight named insurance companies as additional parties plaintiffs without any evidence whatever showing that they were entitled to pro tanto subrogation under the alleged contracts; in admitting the testimony of Mrs. Andrews, over the objection of appellants, that she had issued a fire insurance policy in favor of appellants; in charging the jury that "This contract which the plaintiff accepted, did not pro-

vide that the Plaintiff would pay for the best job and the best material money could buy", facts not based upon the evidence in the record; and in charging the jury that unless they could "honestly say from the evidence you are positive how the fire started, where it started, and was the result of the negligence of the Defendant" they should return a verdict for the Defendant, we earnestly request this Court to grant a rehearing and to give consideration to all of these matters on its own motion, notwithstanding the lack of any objection, specification or exception, in order to prevent a miscarriage of justice.

REQUEST FOR STAY OF MANDATE

It is requested that this Court's mandate in the instant case be stayed (a) until this petition for rehearing has been acted upon and (b) in the event of denial until the time has expired within which appellants may file their petition for review on writ of certiorari with the Supreme Court.

CONCLUSION

For the foregoing reasons we urge that rehearing be granted to the end that the judgment and opinion entered on May 7, 1958, may be withdrawn and that a judgment will be entered reversing the orders and judgments of the District Court entered on May 8, 10 and 14, 1957, with directions to eliminate the named insurance companies as parties plaintiffs and grant appellants a new trial.

Respectfully submitted,

s/ Aaron L. Ford
609 Plaza Building
Jackson, Mississippi,
Attorney for Appellants.

ORDER DENYING REHEARING

Extract from the Minutes of June 11, 1958

HOWARD C. FORD AND LORRAINE H. FORD,

No. v.

UNITED GAS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

CONSTITUTIONAL PROVISION INVOLVED

No person shall be * * * deprived of * * * property without due process of law.

STATUTES INVOLVED

28 U. S. C. 1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States.

* * * * * * *

28 U. S. C. 1652. STATE LAWS AS RULES OF DECISION

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

SECTION 1448, MISSISSIPPI CODE OF 1942.

PARTIES — ASSIGNEE OF CHOSES IN ACTION MAY SUE.

The assignee of any chose in action may sue for and recover on the same in his own name, if the assignment be in writing. In case of a transfer or an assignment of any interest in such chose in action before or after suit brought, the action may be begun, prosecuted and continued in the name of the original party, or the court may allow the person to whom the transfer or assignment of such interest has been made, upon his application therefor, to be substituted as a party plaintiff in said action. If in any case a transfer or assignment of interest in any

demand or chose in action be made in writing before or after suit is filed to an attorney or firm of attorneys, appearing in the case, it shall be sufficient notice to all parties of such assignment or transfer, if such assignment or transfer be filed with the papers in said cause, and such attorney or attorneys shall not be required to be made parties to said suit.

Sources: Codes, Hemingway's 1917, § 497; 1930, § 505; Laws, 1916, ch. 134.

RULES OF PROCEDURE INVOLVED

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(a) PLEADINGS. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

* * *

(c) DEMURRERS, PLEAS, ETC., ABOLISH. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest; but * * * a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; * * *.

(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the District Court is held * * *.

RULE 46. EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 51. INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.